Supreme Court, U.S.
FILED
MAR 23 1982
ALEXANDER L. STEVAS
CLERK

81-1840

NO.

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1981

PATRICK GALLAGHER, Petitioner

v.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a conviction under RICO can lie where an ostensibly legal "enterprise" is defined solely through proof of facts used to establish the "pattern of racketeering".

2. Whether the court of appeals applied the proper constitutional standard in reviewing the significance and effect of flagrant juror misconduct.

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*Patrick Gallagher was an appellant in the court of appeals. Additional appellants were John Bagnariol and Gordon L. Walgren.

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Petitioner Patrick Gallagher respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit entered on December 21, 1981, in United States v. Bagnariol.

OPINIONS BELOW

The opinion of the court of appeals, dated December 21, 1981, is reported at 665 F.2d 877 and is reproduced at Appendix A of a separately bound Consolidated Appendix to Petitions for Certiorari. This Consolidated Appendix is being submitted jointly by petitioner Patrick Gallagher and petitioners John Bagnariol and Gordon L. Walgren. These three petitioners, co-defendants at their trial in district court, also had their appeals consolidated for purposes of review by the court of appeals. The petitioners are now filing

separate petitions for writ of certiorari, but have agreed to submit a joint appendix in support of their respective petitions to this Court.

On February 2, 1982, the court of appeals entered an order denying a petition for rehearing and suggestion for rehearing en banc. That order is reproduced at Appendix G. Petitioner's motion for a stay of mandate pending the filing, consideration and disposition of this petition was granted in an order dated February 23, 1982. See Appendix I.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on December 21, 1981, and the petition for rehearing and suggestion for rehearing en banc was denied by that court on February 2, 1982. On February 23, 1982,

the court of appeals ordered that any petition for writ of certiorari to this Court be filed on or before March 23, 1982. This petition is being filed in compliance with that order. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Sixth Amendment to the United States Constitution and the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §1961 et seq., are set forth in Appendix H.

STATEMENT OF THE CASE

The petitioner, Patrick Gallagher, along with Gordon L. Walgren and John Bagnariol, was charged with various violations of the United States Code in a twenty-nine count indictment. The allegations set forth in Counts I and II of the indictment comprised the majority of the seventy page document. Count I of the indictment alleged a RICO conspiracy charged under 18 U.S.C. §1962(d), while Count II charged a substantive RICO offense under §1962(c). The conspiracy count listed 106 overt acts. Twenty-six of those overt acts alleged conduct involving the use of the mails, travel and interstate commerce or the use of the phone in interstate commerce. Each of those twenty-six overt acts resulted in a separate, substantive count of the

indictment: Count III of the indictment charged a violation of 18 U.S.C. §1951. Counts IV through XVII listed violations of the Travel Act, 18 U.S.C. §1952; Counts XVIII through XXIX listed acts charged under the Mail Fraud statute, 18 U.S.C. §1341. Those twenty-six overt acts/substantive counts were alleged to be the "pattern of racketeering" component of the RICO charges.

The language used to define the enterprise component of the RICO charges was the same for both Counts I and II. The enterprise definition alleged that:

> JOHN BAGNARIOL, GORDON L. WALGREN and PATRICK GALLAGHER associated in fact for the purposes of (a) legalizing and controlling certain unlawful gambling within the State of Washington, including, but not limited to, expanded cardroom gambling, casino gambling, and slot machines; (b) controlling the distribution and servicing of slot machines within the State of Washington; and (c) gaining political offices and official positions within the

> State of Washington, and using such political offices and official positions for personal financial gain; all through acts involving extortion, bribery, mail fraud, interstate travel in aid of racketeering, and by avoiding the requirements of the Public Disclosure Law of the State of Washington.

The defendants possessed significant political stature in the Washington State legislature prior to their convictions. Gordon L. Walgren was the Senate Majority Leader, John Bagnariol the House Speaker, and Patrick Gallagher a well-known lobbyist. The indictment alleged that the three defendants associated for the purpose of using their influence and power to assist a corporation called So-Cal to obtain favorable gambling legislation in the State of Washington. So-Cal would then control an aspect of the gambling industry and would pay the defendants a share of its "profits" in return for their influence.

So-Cal was actually a fictitious organization, a cover for an FBI "sting" operation. FBI undercover agents, under the direction of the United States Attorney's Office for the Western District of Washington, wined and dined the defendants for nearly two years while soliciting their assistance in promoting gambling legislation in the State of Washington.

The trial lasted approximately ten weeks. The Government's case was presented primarily through introduction of clandestinely taped conversations between the defendants and FBI agents. These taped conversations included telephone calls made by FBI agents to the defendants from locations outside of the State of Washington and talk at dinners in the State of Oregon to which the defendants had been invited by the FBI agents. Numerous conversations in barrooms during which the defendants made unbecoming statements were also recorded

and introduced at trial. Petitioner Gallagher boasted at length during many of the conversations, making incredible promises and claims.

One Government witness was called to testify as to the potential for an impact on interstate commerce if gambling laws in the State of Washington were liberalized. However, the evidence showed, and the Government conceded, that the three politically powerful defendants did nothing to actively promote or introduce gambling legislation during the period covered by the indictment.

Following the Government's case, each defendant testified on his own behalf. Each denied harboring an intent to assist So-Cal in achieving its goal of liberalized gambling legislation. Each denied taking any action which might have assisted in effecting a change in Washington gambling

laws. This fact was clearly established at trial. Each defendant admitted harboring a desire to tap into the apparently substantial financial resources of So-Cal, but only through private ventures unassociated with Governmental functions. The defendants testified that they believed that the FBI agents were representatives of a legitimate business, not organized criminals as the Government maintained.

Following presentation of the evidence, numerous counts of the indictment were dismissed as to each defendant. Petitioner Gallagher was convicted on all of the fourteen counts submitted to the jury which related to him.

Following trial but before sentencing, it was reported that a juror during trial conducted his own independent investigation of an issue pending before the jury. The trial court conducted a hearing to

determine the precise nature of the misconduct. It was learned that during trial the juror had visited the Seattle Public Library where he researched business references to determine whether there existed a listing for So-Cal, the fictitious front corporation used by the FBI as a cover for its investigation. At the hearing the juror admitted his misconduct. He explained that he did so because "[it] seemed rather odd to me, I am just a normally prudent man, that if I were doing business on the order which was discussed in this courtroom, that I certainly would have checked any organization that I was going to do business with and that I was really quite surprised that the persons involved had not checked to find out that this is what I would call an existing corporation." He went on to admit that he discovered in short order that So-Cal was not listed in the publications

he researched and that he was "surprised" that the defendants, "being wise businessmen as they were, wouldn't have found out likewise." He went on to admit that he told other jurors about his research and findings. The trial court denied motions for a mistrial.

In a unanimous decision, the court of appeals affirmed the convictions of the defendants on all counts.

REASONS FOR GRANTING THE PETITION

1. THE OPINION OF THE COURT OF APPEALS HOLDS THAT A CONVICTION UNDER RICO CAN STAND WITHOUT PROOF OF THE EXISTENCE OF AN "ENTERPRISE" WHOSE AFFAIRS HAVE AN EFFECT ON INTERSTATE COMMERCE, A RESULT WHOLLY AT ODDS WITH THIS COURT'S DECISION IN UNITED STATES V. TURKETTE, ___ U.S. ___, 101 S.CT. 2524 (1981).

The decisicn of the court of appeals effectively eliminates the requirement that the Government prove the existence of an enterprise whose affairs affect interstate commerce when pursuing convictions under

RICO. This startling result occurred because of the complete misapplication by the court of appeals of the principles set forth in Turkette, supra. Turkette held that RICO applies to a group of individuals associated in fact to commit unlawful acts, that is, two wholly illegitimate enterprises. This Court reasoned that the language of 18 U.S.C. §1962(c) literally and logically applied to enterprises whose entire purpose was to break the law when such purpose was pursued through a "pattern of racketeering."

In so holding, Turkette foresaw that in cases involving wholly illegimate enterprises, proof of the two separate elements of RICO, the "enterprise" and "the pattern of racketeering", might "in particular cases coalesce." 101 S.Ct. at 2528.

Seizing this Court's language, but not its logic, the court of appeals held:

> But when the government defines the enterprise as an association of persons formed for the purpose of conducting illegal acts, the same acts that constitute the activities of the enterprise are the subject of charges for predicate crimes. The government need not choose between charging these activities as predicate acts or proving the conduct as a basis for jurisdiction."
>
> 665 F.2d at 893.

While the reasoning above is sound, it has absolutely no application to the facts or issues analyzed by the court of appeals.

The enterprise alleged, defined and provided in this case was a legal or ostensibly legal enterprise: an association of individuals whose purpose was to use political influence to promote gambling law changes in the State of Washington. The purpose of the enterprise was not to perform illegal acts but to effect legislative change, a wholly legitimate pursuit. The Government went on to charge that the

enterprise sought to achieve its purpose through specified illegal acts or a "pattern of racketeering". Because the Government did not charge an illegal enterprise whose only purpose was to perform illegal acts, the ruling of the court of appeals had no application to the facts before it. The purpose of the charged enterprise was not to commit illegal acts. Had the court of appeals applied Turkette in context, this would have been clear. In Turkette, this Court ruled:

> While the proof used to establish these separate elements may in particular cases coalesce, proof of one does not necessarily establish the other. The 'enterprise' is not the 'pattern of racketeering activity'; it is an entity separate and apart from the pattern of activity in which it engages. The existence of an enterprise at all times remains a separate element which must be proved by the Government.
>
> 101 S.Ct. at 2528-2529.

Turkette noted that an "enterprise is an entity, for present purposes a group

of persons associated together for a common purpose of engaging in a course of conduct." 101 S.Ct. at 2528. When a legal enterprise has been charged, the Government must prove that the affairs of that enterprise impact interstate commerce. Proof that the predicate acts forming the "pattern of racketeering" impacted interstate commerce will not satisfy the jurisdictional requirement. United States v. Rone, 598 F.2d 564, 573 (9th Cir, 1979); United States v. Stratton, 649 F.2d 1066, 1075 (5th Cir. 1981); United States v. Nerone, 563 F.2d 836 (7th Cir. 1977).

The court of appeals apparently agreed that the enterprise here had no independent impact on interstate commerce outside of the proofs relating to the pattern of racketeering. This conclusion is consistent with the proofs at trial. The court of

appeals quite apparently misconstrued the charged enterprise as being illegal in composition. In so holding the court of appeals eliminated the jurisdictional requirement of the Racketeer Influenced and Corrupt Organizations Act. This holding is at complete odds with the language of 18 U.S.C. §1962(c) and every decision interpreting this troublesome statute, including Turkette. The error of the court of appeals is manifest and must be corrected.

2. THE COURT OF APPEALS FAILED TO APPLY THE PROPER STANDARD OF REVIEW IN ITS ANALYSIS OF THE JUROR MISCONDUCT.

What standard the court of appeals applied in reviewing the evidence relating to juror misconduct is unclear. The court of appeals ultimately found: "Although we do not condone Mr. Cohen's independent research, we conclude that it did not so

affect the appellants' right to a fair trial that it requires reversal." 665 F.2d at 889.

When reviewing issues involving constitutional error, as was the case with the juror misconduct in this case, the reviewing court must be able to "declare a belief that . . . [the error] is harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18 (1967). The court of appeals does little more than pay lip service to this standard.

The court of appeals discussed the juror misconduct in some detail. That discussion is remarkable only for its persistence in sidestepping the issue before it. The nature of the juror misconduct was apparent. The court of appeals employed lengthy, convoluted logic to minimize the impact of that misconduct. It did so in the face of its obligation

to determine the nature of the misconduct and whether "there is the slightest possibility that harm could have resulted" from that misconduct. United States v. Marks, 485 F.2d 1179, 1184 (10th Cir. 1973). Rather than face this task, the court of appeals deferred to the judgment of the trial court, noting that:

> The trial judge conducted a prompt and thorough evidentiary investigation into juror Cohen's actions and applied the correct legal standard.

665 F.2d at 887.

It is axiomatic that the court of appeals should have conducted its own review. It failed in that obligation and violated the principles set forth in Chapman, supra.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the

judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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